88-1196

Supreme Court, U.S.
FILED
AUG 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

October 1987 Term

STATE OF FLORIDA,

Petitioner,

v.

WILLIE POTTS, Jr.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

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COUNSEL FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

DOES A STATE STATUTORY SCHEME PROVIDING ENHANCED PENALTIES FOR INDICTEES WHO CARRY CONCEALED FIREARMS DENY SUCH INDICTEES THEIR FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

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Potts v. State,
13 F.L.W. 78 (Fla. 4th DCA December 30, 1987), affirmed sub.nom. State v. Potts, 13 F.L.W. 353 (Fla. June 2, 1988)

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of State v. Potts, 13 F.L.W. 353 (Fla., June 2, 1988), affirming Potts v. State, 13 F.L.W. 79 (Fla. 4th DCA, December 30, 1987), pursuant to 28 U.S.C. §1257(3).[1]

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[1] Please see Appendix I for the text of these decisions.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED[2]

Amendments V and XIV (Section 1),
Constitution of the United States.

Rule 17.1(b), Rules of the
Supreme Court of the United States.

§§790.01(2) and 790.07(2), Fla. Stat.

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[2] Please see Appendix II for the texts of these authorities.

STATEMENT OF THE CASE AND FACTS

For purposes of framing the narrow legal issue presented in its petition for writ of certiorari, petitioner, the State of Florida, adopts the decision under review, State v. Potts, 13 F.L.W. 353 (Fla., June 2, 1988), affirming Potts v. State, 17 Fla. 78 (Fla. 4th DCA December 30, 1987), as its "statement of the case and facts."[3]

For the convenience of the Court, the State would summarize that the decision below held that §790.07(2), Fla. Stat., by providing for enhanced penalties for indictees as opposed to others who carry concealed firearms, see §790.01(2), Fla. Stat., violated respondent Willie Potts, Jr.'s federal consti-

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[3] References to the two volume record on appeal to be transmitted to this Court if certiorari is granted will be designated "(R:)."

tutional right to substantive due process of law as guaranteed by Amendments V and XIV, Constitution of the United States.

REASONS FOR GRANTING THE WRIT

State v. Potts conflicts with United States v. Craven, infra, on the question of whether the federal due process clause permits the imposition of legislatively enhanced punishments against indictees for firearms violations.

ISSUE

DOES A STATE STATUTORY SCHEME PROVIDING ENHANCED PENALTIES FOR INDICTEES WHO CARRY CONCEALED FIREARMS DENY SUCH INDICTEES THEIR FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

DISCUSSION

In State v. Potts, the Florida Supreme Court affirmed the decision of the Florida Fourth District Court of Appeal in Potts v. State, that §790.07(2), by providing for enhanced penalties for indictees as opposed to others who carry concealed firearms, see §790.01(2), violated respondent's federal constitutional right to substantive due process of law. The Florida court found that covertly armed indictees are not necessarily more dangerous than covertly armed nonindictees, and hence that aggravated penalties for indictees bore no rational

relationship to the legitimate state interest of protecting the public safety.

18 U.S.C. §922(n) provides that "it shall be unlawful for any person who is under indictment" to ship or receive firearms beyond state lines. The federal appellate courts have routinely upheld statutes such as this against due process challenges identical to that tendered by respondent below. See, e.g., United States v. Craven, 478 F.2d 1329, 1338-1340 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973); United States v. Snell, 508 F.2d 21, 23-24 (5th Cir. 1975), cert. denied, 423 U.S. 825 (1975); United States v. Thoresen, 428 F.2d 654, 658-662 (9th Cir. 1970). Consider the following example:

> It was eminently reasonable for Congress to conclude that the indictment of an individual for a crime punishable by

> imprisonment for a term exceeding one year is so often indicative of a propensity for violence that the indictment classification of 18 U.S.C. §922..was justified in the public interest.

United States v. Craven, 478 F.2d 1329, 1339.

Respondent submits that the Florida Supreme Court's decision in State v. Potts conflicts with the Sixth Circuit's decision in United States v. Craven on the federal constitutional question of whether enhanced sanctions may be imposed upon indictees for firearm violations under the due process clause. This conflict vests this Honorable Court with jurisdiction to review State v. Potts. Rule 17.1(b), Rules of the Supreme Court of the United States; see generally, Michigan v. Long, 463 U.S. 1032, 1037-1044 (1983). If the

Court is not disposed to grant plenary review, a summary reversal on grounds that the Florida Supreme Court failed to properly apply the aforediscussed federal precedents, with or without a remand to that court, would certainly be acceptable to the State.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court should GRANT its petition for writ of certiorari and REVERSE the Florida Supreme Court's decision in State v. Potts, with directions that the adjudication and sentence entered by the trial judge be REINSTATED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32399

JOHN W. TIEDEMANN
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111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Petitioner

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APPENDIX I

Copy of the Decision under
Review, State v. Potts,
13 F.L.W. 353 (Fla. June 2, 1988),
affirming Potts v. State,
13 F.L.W. 78 (Fla. 4th DCA,
December 30, 1987)

IN THE SUPREME COURT OF FLORIDA

- - - - - - - - - - - - - - - - - -

NO. 71,765

- - - - - - - - - - - - - - - - - -

STATE OF FLORIDA,

Appellant,

v.

WILLIE POTTS, JR.,

Appellee.

Robert A. Butterworth, Attorney General, Lee Rosenthal and John W. Tiedemann, Assistant Attorneys General, West Palm Beach, Florida, for appellant.

Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for appellee.

- - - - - - - - - - - - - - - - - -

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

- - - - - - - - - - - - - - - - - -

(June 2, 1988)

(BARKETT, J.) We have on appeal Potts v. State, No. 4-86-1073 (Fla. 4th DCA 1987), which declared unconstitutional a portion of section 790.07(2), Florida Statutes (1985). Jurisdiction is mandatory. Art. V, §3(b)(1), Fla. Const.

Having reviewed the entire record in this case, we have determined that the district court's decision below is an eminently correct statement of the law. The state through its criminal process may not penalize someone merely for the status of being under indictment or otherwise accused of a crime, as it has attempted to do here. We therefore approve and adopt the district court's opinion in its entirety as our own. Section 790.07(2), Florida Statutes (1985), is facially unconstitutional to the extent it purports to penalize a

person who is under indictment with greater severity than one who is accused of no crime.

It is so ordered. (McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., Concur.)

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT

- - - - - - - - - - - - - - - - - - - -

NO. 4-86-1073

- - - - - - - - - - - - - - - - - - - -

WILLIE POTTS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Richard L. Jorandby, Public Defender, and Charles D. Peters, Assistant Public Defender, West Palm Beach, Florida, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Lee Rosenthal, Assistant Attorney General, West Palm Beach, Florida, for appellee.

- - - - - - - - - - - - - - - - - - - -

APPEAL FROM THE CIRCUIT COURT FOR
PALM BEACH COUNTY

- - - - - - - - - - - - - - - - - - - -

(December 30, 1987)

(HERSEY, C.J.) Willie Potts, Jr., was convicted of violation of section 790.07(2), Florida Statutes (1985), which provides:

> Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

(Emphasis added.) He asserts, on appeal, the unconstitutionality of that statute on due process grounds.

In considering whether or not a statute violates substantive due process, the basic test is whether the state can justify the infringement of its legislative activity upon personal rights and liberties. State v. Walker, 444 So.2d 1137 (Fla. 2nd DCA), affirmed, 461 So.2d 108 (Fla. 1984). The statute must bear

a reasonable relationship to the legislative objective and must not be arbitrary. Id. If there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld. Id.

Here, the state contends that the objective of the disputed statute is to protect the health and safety of the public. The state also contends that it is not unreasonable to presume that persons "under indictment" present a greater risk to society than other citizens; therefore the statute bears a reasonable relationship to the legislative objective.

If an individual is presumed innocent until proven guilty, however, how can it validly be assumed that individ-

uals "under indictment" necessarily present a greater risk to society than other citizens? There are, of course, provisions for deprivation of liberty while pending trial in certain cases. See §907.041, Fla. Stat. (1985); Fla.R. Crim.P. 3.132. But in those instances, unlike here, a defendant has an opportunity to be heard on the matter of his potential threat to society.

Carrying a concealed weapon while not under indictment, prohibited by section 790.01(1), is a first-degree misdemeanor, punishable by a maximum of one year in prison, whereas the instant offense is a second-degree felony, punishable by fifteen years in prison. The instant statute, therefore, in effect criminalizes the activity of "being under indictment" and punishes that of-

fense by up to fourteen years' imprisonment. Is an individual "under indictment" who carries a concealed weapon necessarily more dangerous than an individual NOT "under indictment" who carries a concealed weapon? What if an individual is convicted under the instant statute and is sentenced to fifteen years' imprisonment and then is later found not guilty of the charges for which he was "under indictment"?

Although we agree with the state that there is a legitimate interest in protecting the health and safety of the public, we do not agree that criminalizing the status of being "under indictment" is a reasonably related means to achieve the intended end. Therefore, despite the rule that every presumption is to be indulged in favor of the valid-

ity of a statute when considering its constitutionality, Griffin v. State, 396 So.2d 152 (Fla. 1981), we conclude that the portions of section 790.07 which prohibit certain activities "while under indictment" are unconstitutional as violative of substantive due process.

Below, appellant raised the constitutional issue by way of an ore tenus motion to dismiss. The trial court summarily denied the motion, however, as untimely. The state now contends that the constitutional issue was waived, because grounds other than fundamental grounds for a motion to dismiss are waived if not timely presented. Fla.R. Crim.P. 3.190(c). Application of a facially unconstitutional statute, however, such as occurred here, constitutes fundamental error. See Trushin v.

State, 425 So.2d 1126 (Fla. 1982); Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984), remanded on other grounds, 477 So.2d 557 (Fla. 1985). Accordingly, the issue was not waived and is properly before this court for review.

Finding the statute unconstitutional, we reverse and remand with instructions to discharge the appellant unless he is being held on other charges or is incarcerated for other convictions.

REVERSED AND REMANDED. (DOWNEY and WALDEN, JJ., concur.)

APPENDIX II

Copy of the Constitutional Provisions and Regulations Involved

Amendments V and XIV (Section 1), Constitution of the United States:

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1(b), Rules of the Supreme Court of the United States:

> RULE 17. Considerations governing review on certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered...
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

§790.01(2), Fla. Stat.:

> 790.01. Carrying concealed weapons...
> (2) Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§790.07(2), Fla. Stat.:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

EDITOR'S NOTE

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No. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

==========

STATE OF FLORIDA,

Petitioner,

v.

WILLIE POTTS, JR.,

Respondent.

==========

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, WILLIE POTTS, JR. by his undersigned counsel, asks leave to file his Response in Opposition to the Petition for Writ of Certiorari filed in this cause submitted herein without payment of costs and fees and to proceed in forma pauperis. Respondent's affidavit in support of this request is attached hereto.

This ____ day of August, 1988.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
West Palm Beach, Florida 33401
(407) 820-2150

BY _____
ANTHONY CALVELLO
Assistant Public Defender
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401, this ____ day of August, 1988.

_____
Of Counsel

No. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

==========

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE POTTS, JR.,

Respondent

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, WILLIE POTTS, JR., being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer:

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received: Potts, Law Mart, Fla 82

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment?

Yes [ ] No [✓]

b. Rent payments, interest or dividends? Yes [ ] No [✓]

c. Pensions, annuities or life insurance payments?

Yes [ ] No [✓]

d. Gifts or inheritance? Yes [ ] No [✓]

e. Any other sources? Yes [ ] No [✓]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

_____

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts)

Yes [ ] No [✓]

If answer is "yes", state the total value of the items owned. _____

_____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [✓] No [ ]

If the answer is "yes" describe the property and state its approximate value. automobiles " Value ☐ 300..

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support: _____

_____

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

SIGNED on 5/3/88 Willie Potts Jr.

(Date) (Signature)

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

WILLIE POTTS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Willie Potts Jr.
Signature of Respondent

SUBSCRIBED and SWORN to before me this 3rd day of May, 1988.

NOTARY PUBLIC

My Commission Expires:

NO. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE POTTS, JR.,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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(407) 820-2150

ANTHONY CALVELLO
Assistant Public Defender

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Whether this Court Should Grant Certiorari and Review The Decision of the Florida Supreme Court On The Issue of Whether Section 775.-07(2), Florida Statutes (1985) is Constitutional When The Court's Opinion Was Based on Article I, Section Nine of the Florida Constitution

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CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9 of the Florida Constitution (1968) provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law....

STATUTORY PROVISION INVOLVED

Section 790.07(2), Florida Statutes (1985) provides:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, display, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, and § 775.084.

COUNTERSTATEMENT OF THE CASE AND FACTS

The Florida Supreme Court in State v. Potts, 13 F.L.W. 353 (Fla. June 2, 1988) affirmed and adopted the holding of the lower Florida appellate court, State v. Potts, 13 F.L.W. 78 (Fla. 4th DCA Dec. 30, 1987) which held a Florida state statute, section 790.07(2), Florida Statutes, (1985)[1] unconstitutional on its face. The Florida appellate court held:

> Although we agree with the state that there is a legitimate interest in protecting the health and safety of the public, we do not agree that criminalizing the status of being "under indictment" is a reasonably related means to achieve the intended end. Therefore, despite the rule that every presumption is to be indulged in favor of the validity of a statute when considering its constitutionality, Griffin v. State, 396 So.2d 152 (Fla. 1981), we conclude that the portions of section 790.07 which prohibit certain activities "while under indictment" are unconstitutional as violative of substantive due process.

Respondent relies on the statement of the case and facts as found by the Florida courts in Potts.

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[1] Section 790.07(2), F.S. (1985) provides:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, display, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, and § 775.084. [Emphasis added]

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT AND LOWER FLORIDA APPELLATE COURT BASED ITS HOLDINGS UPON THE FLORIDA CONSTITUTION AND FLORIDA LAW

The critical question before the Court in regard to the petition for writ of certiorari is whether there is any legal basis for a grant of certiorari. It is strenuously submitted that none of the criteria listed under Rule 17 of the Court have been met. Quite simply, this case does not concern a federal question. This case was resolved on the basis of Florida state law and the Florida Constitution, specifically Article I, Section 9, the Florida due process clause.

Petitioner argues that the Court should grant certiorari because "the Florida Supreme Court's decision in State v. Potts, conflicts with the Sixth Circuit's decision in United States v. Craven [478 F.2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973)] on the federal constitutional question of whether enhanced sanctions may be imposed upon indictees for firearm violations under the due process clause." Petitioner's Petition at 9. Respondent disagrees.

Petitioner's argument ignores or overlooks the fact that the Potts decision was decided on independent State grounds namely the due process clause of the Florida Constitution, Article I, Section 9. The Florida courts did not cite the Fourteenth Amendment or federal cases. Rather they specifically relied on Florida state court decisions.

The Florida Due Process Clause has been held to have broader application than the federal clause. In State v. Glosson, 462 So.2d 1082 (Fla. 1988), the Florida Supreme Court rejected the narrow application of the due process defense found in federal cases and expressly held the the particular governmental misconduct involved violated the Florida due process clause, Article I, Section 9 of the Florida Constitution (1968). Thus in Glosson, the Florida Supreme Court expressly held that a broader interpretation of the State's due process clause was warranted.

It is well-settled historically that this Court will not grant review where there exists adequate State grounds to support the action of the State court. Brown v. Union Pac. R. Co., 267 U.S. 255, 259 (1925). It has also been held that the "Court will decline to review State court judgments which rest on independent and adequate State grounds, notwithstanding the co-presence of federal grounds." Faye v. Noia, 372 U.S. 391, 428 (1963). In Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476 (1983) this Court stated that if the decision of the State court "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Hence on this basis review should be denied.

Even assuming arguendo, that the Potts decision was somehow incorrectly decided by the Florida Supreme Court, there is absolutely no compelling reason for this Court to grant review. The Florida Supreme Court has unanimously stated that a Florida statute is unconstitutional. The Florida Supreme Court has not decided a federal question in a way in conflict with the decision of a federal court of appeals. See Rule 17.1(b). Further, Petitioner has failed to articulate any important or compelling reason to grant certiorari in this cause. Hence the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 820-2150

ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 31st day of August, 1988.

Of Counsel